In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1387

LEO M. HIKEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) has not yet been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1972. The petition for a writ of certiorari was filed on April 27, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in forbidding cross-examination of a prosecution witness on a point not raised in the course of the direct examination.

2. Whether petitioner was given timely warnings of

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his rights in the course of an investigation of his tax liabilities by Internal Revenue Service agents.

STATUTE INVOLVED

Section 7201 of the Internal Revenue Code of 1954 provided:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall * * * be guilty of a felony * * *.

STATEMENT

Petitioner was convicted of attempting to evade his income taxes for 1964, 1965, and 1966, in violation of 26 U.S.C. 7201 (R. 15–16).[1] Petitioner reported a total of $4,725.15 in taxable income for the three years; the government's reconstruction of petitioner's income by the bank deposits method[2] tended to prove that he failed to report additional taxable income totaling approximately $61,000 (R. 112–113) and additional tax liability totaling $16,543.54 for the same three years (R. 151–152). Petitioner was sentenced to three years' imprisonment on each count, sentences to run concurrently.

In the course of an Internal Revenue Service audit of his personal income tax return for 1966, petitioner furnished his bank and retail drug store records to

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[1] "R" references are to the appendix in the court below.

[2] The bank deposits method is a recognized way of reconstructing income of a taxpayer whose records are inadequate or unavailable. *United States* v. *Frank*, 245 F. 2d 284, 287 (C.A. 3), certiorari denied, 355 U.S. 819; *United States* v. *Doyle*, 234 F. 2d 788 (C.A. 7), certiorari denied, 352 U.S. 853.

the revenue agent, who advised petitioner that his bank deposits appeared to be far in excess of his business receipts (R. 55, 63). On several occasions during the audit, the revenue agent asked petitioner what other sources of funds might account for the discrepancies, but petitioner was unable to suggest an answer (R. 55–57). On the second such occasion, petitioner asked if he would have to go to jail concerning this matter, and the revenue agent said he could not answer the question (R. 56). Thereafter, petitioner continued to furnish records to the revenue agent (R. 56–57). Subsequently, the case was assigned to a special agent of the Intelligence Division, who advised petitioner of his rights (R. 67). Petitioner supplied additional records to the special agent (R. 72), and he furnished the agent with information on stock brokerage accounts which petitioner said represented trading activity by his wife (R. 72, 75, 120–121, 148).

Petitioner's tax returns were prepared by an accountant from "final figures" supplied by petitioner (R. 43). The accountant noted that petitioner's 1965 return showed a $7,600 loss from the sale of securities, as compared with $7,500 in reported income from his business (R. 45). The accountant asked petitioner the source of the money lost in stock transactions (R. 43–44) as well as the source of his large bank deposits, including one deposit of over $9,000 (R. 46–47). As to the source of the stock investment money, petitioner "jokingly said he had a rich son-in-law in Texas" (R. 44) and he "didn't know" why some bank deposits were so large (R. 47). The testimony of the accountant did not touch upon the petitioner's financial

transactions in prior years. Accordingly, the district court sustained an objection by the prosecutor to cross-examination of the accountant as to her knowledge, if any, of a reputed large capital gain prior to 1965 (R. 48–49).

The court of appeals affirmed (Pet. A1–A3). It held that the limitation of the cross-examination of the accountant did not constitute an abuse of discretion because the cross-examination would have introduced a collateral issue which had not been covered on direct examination. It also held that petitioner was not in actual or constructive custody when first interviewed by the revenue agent and that that interrogation was not subject to the requirements of *Miranda* v. *Arizona*, 384 U.S. 436, and *Escobedo* v. *Illinois*, 378 U.S. 478.

ARGUMENT

1. There is no merit in petitioner's contention (Pet. 11–17) that the limitation on cross-examination of the accountant was erroneous. Petitioner was not probing the credibility of the accountant's testimony. Cf. *Alford* v. *United States*, 282 U.S. 687. He was seeking, rather, to establish the defense that he had, or might have had, capital gains in prior years which could have led him to believe that his stock investments in the prosecution years were out of prior accumulations rather than out of his current income (R. 49). The district court's ruling was therefore proper as an exercise of discretion, not only to keep cross-examination within bounds, *i.e.*, limited to matters covered on direct examination of the witness, but also to prescribe the order of proof. *United States* v.

Horastein, 176 F. 2d 217, 220–221 (C.A. 7); *United States* v. *Bender*, 218 F. 2d 869, 873–874 (C.A. 7). See generally McCormick, *Evidence*, Sections 24, 27, 29 (2d ed. 1972). Petitioner had full opportunity to present this defense in his own testimony, or by calling the accountant as a defense witness, producing brokerage records of prior gains, examining the investigating agents as to the inclusion in the bank accounts of funds derived from stock market transactions, and so forth. Under these circumstances, petitioner clearly was not prejudiced by the ruling of the district court.

2. There is no merit in petitioner's contention (Pet. 17–27) that the government used the revenue agent "as an instrument of deceit" (Pet. 21) to obtain incriminating admissions and records from him. Petitioner, aside from pure speculation and conjecture, relies solely on the fact that the revenue agent said he could not answer petitioner's inquiry whether he would have to go to jail "for this." At the time of this exchange, on January 22, 1968, the agent was aware only of an apparent excess of bank deposits over petitioner's reported receipts for 1966 (R. 55–56). It was not until later that the revenue agent discovered a similar pattern for 1965 (R. 56), and the 1964 pattern was examined after the special agent entered the investigation (R. 72).

In only developing sufficient evidence to justify a referral to the Intelligence Division for consideration of a fraud investigation, the revenue agent was not required to provide *Miranda* warnings. *United States* v. *Lockyer*, 448 F. 2d 417, 421–422 (C.A. 10). As

noted in its opinion (Pet. A–3), the court below, and other circuits generally, have held that such warnings are not required in non-custodial interrogations involving possible internal revenue law violations. See *United States* v. *Jaskiewicz,* 433 F. 2d 415, 420 (C.A. 3), certiorari denied, 400 U.S. 1021, and the other cases cited therein. Contra: *United States* v. *Dickerson,* 413 F. 2d 1111, 1116 (C.A. 7). While admissions procured by deceit which misrepresents the nature of an investigation are not considered voluntary, such deceit must stem from affirmative misrepresentations by the agents. *United States* v. *Tonahill,* 430 F. 2d 1042, 1044 (C.A. 5), certiorari denied, 400 U.S. 943. No such acts of deceit occurred in this case.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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